

1941

Present : Howard C.J. and Hearne J.

MARIKAR *et al.* v. CADER.

25—D. C. Jaffna, 15,186.

Registration of seizure—Mortgage pending seizure—Sale in execution after the lapsing of registration—Mortgage void as against sale—Renewal of old mortgage pending seizure—Validity—Civil Procedure Code, s. 238.

Where property is seized in execution and the seizure is registered a mortgage of the property, while the registration of the seizure is in force, is void as against the Fiscal's transferee although the sale in execution took place after the registration of the seizure had lapsed.

Section 238 of the Civil Procedure Code does not operate to give a purchaser a title free of a mortgage executed while the registration of the seizure is in force, if such mortgage is merely a renewal in whole or in part and not in excess of a mortgage existing prior to registration.

A PPEAL from a judgment of the District Judge of Jaffna.

N. Nadarajah (with him H. W. Thambiah and Nadarasa), for 3rd defendant, appellant.

S. Nadesan (with him S. Rajaratnam) for plaintiffs, respondents.

Cur. adv. vult.

¹ J. L. R. 25 Madras 61.

³ 27 N. L. Rec. 13.

² 16 N. L. R. 252.

November 20, 1941. HEARNE J.—

The plaintiffs sued the first and second defendants on an otty mortgage (P. 5) dated November 29, 1936. P 5 acknowledges the receipt of a sum of Rs. 350, binds the land described in the Schedule and states that "a prior mortgage", referred to as bond 17,478, has been executed on the same date in order to secure a loan of Rs. 300.

The circumstances in which P 5 and the primary mortgage were executed are these. The land had previously been mortgaged to the plaintiffs on bond P 2 dated March 25, 1936, for a sum of Rs. 500. On November 29, 1936, a sum of Rs. 300 was borrowed from one Muthupillai and bond No. 17,478 was executed in his favour. Out of the sum of Rs. 300, Rs. 150 were paid to the plaintiffs who then took the secondary mortgage in respect of the balance of Rs. 350 still due to them, and a receipt was passed in discharge of P 2.

In execution of a decree for costs in another case the land, which is the subject-matter of this case, was seized on June 20, 1936, and the seizure was registered on June 25, 1936. For various reasons the sale of the land was delayed for some time. It was finally sold on September 7, 1939, and a conveyance to third defendant was made on November 2, 1939.

The point that arises for decision is whether the third defendant's title on the Fiscal's conveyance is free of or subject to the mortgage created by P 5. It was admitted for the purpose of the appeal that P 5 was executed at a time when the registration of the seizure effected on June 25, 1936, was in force, and it follows from this, by virtue of the provisions of section 238 of the Civil Procedure Code, that P 5 is *prima facie* void against the third defendant as the purchaser from the Fiscal selling under a writ of execution. The District Judge took the view that this position would result in law only if P 5 was executed *and* the sale by the Fiscal took place while the registration was in force. As the latter condition was not fulfilled, the registration having lapsed on December 24, 1936, he held against the third defendant who has appealed. The interpretation given to section 238, Civil Procedure Code, is not, in my opinion, warranted by the language of the section and Counsel for the plaintiffs-respondents found himself unable to support the learned Judge's reasoning.

He has, however, supported the conclusion of the Judge for another reason which the latter mentioned in his judgment. It was argued by Counsel that when the registration of the seizure was effected on June 25, 1936, P 2 was in existence, that this instrument charged the land with the payment of a debt of Rs. 500, that P 5 was a renewal of part of the debt, viz., Rs. 350 and that, therefore, the provisions of section 238 do not affect the validity of P 5 as against the third defendant.

The provisions of section 238 do not, in my opinion, operate to give a purchaser a title free of a mortgage executed while the registration of a seizure is in force, if such mortgage is merely a renewal, in whole or in part and not in excess, of a mortgage existing prior to the registration. This view follows Indian decisions, *4 Mad. 417* and *29 Cal. 154*, based on the section of the Indian Code corresponding to section 238. Counsel for the third defendant-appellant suggested that it might be dangerous

to follow Indian authority in the absence of knowledge of the law relating to mortgages in India and, in particular, of any special law that may exist in regard to the renewal of mortgages. It is clear, however, from the judgment in *29 Cal. 154* that what was held really to matter was the intention of the parties not to extinguish earlier mortgages but to keep them alive, and it is that test that must be applied having regard to the law of mortgage in Ceylon and the particular circumstances of this case.

If P 5 represented the only transaction that took place on November 29, 1936, if for instance the mortgagors had paid Rs. 150 out of their own pockets and, on P 2 being discharged, P 5 had come into existence, I would have no hesitation in holding that that transaction was within the four corners of the Indian decisions which I respectfully follow, and that P 5 was not void against the third defendant.

The position, however, is complicated by the fact that on November 29, 1936, bond No. 17,478 was also signed, charging the property with a debt of Rs. 300. What is the effect of this transaction? Does it alter the rights of the plaintiffs relative to the third defendant? In my view it does.

Following the reasoning of the Privy Council in the Calcutta case (*supra*) section 238 does not render void transactions which do not prejudice a purchaser but, so far as they do prejudice him, they are void as against him. Bond 17,478, being part and parcel of an arrangement for liquidating a portion of the mortgagors' existing obligation to the plaintiffs and being for a sum which was less than the existing obligation, is not avoided. But the secondary mortgage to the plaintiffs is avoided against the purchaser by the extent to which the amount secured by that mortgage, after taking into account the amount of bond 17,478, exceeds the original debt, namely, Rs. 150.

The decree will require to be amended accordingly. In all the circumstances I would order that the parties to this appeal should bear their own costs. The appellant was not ordered to pay any costs of trial.
HOWARD C.J.—I agree.

Judgment varied